Chan Yoke Hong & 21 Ors v Pujian Development Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–573 OF 2003
NURCHAYA ARSAD J
18 JANUARY 2011

Contract — Breach — Compensation — Failure to deliver vacant possession — Actual damage or reasonable compensation — Whether proved — Amount stipulated in SPA — Whether genuine pre-estimate of damages — Contracts Act 1950 s 75

Contract — Breach — Sale and purchase agreement — Vacant possession — Delivery of — Failure to deliver within stipulated time — Whether fundamental breach — Whether plaintiff entitled to terminate SPA — Whether plaintiffs waived their rights — Whether plaintiffs in breach of SPA for failure to make progress payment

The plaintiffs were seeking rescission of the sale and purchase agreement ('SPA') executed with the first defendant, the developer of commercial properties. The first defendant failed to construct and deliver vacant possession of the plaintiffs' properties within 30 months from the date of the SPAs. The plaintiffs contended that the failure of the first defendant to deliver the vacant possession within the stipulated time amounted to a fundamental breach and thus, they were lawfully entitled to terminate the SPA. The first defendant however, argued that the plaintiffs were not entitled to terminate the SPAs because the remedy for the late delivery was compensation by liquidated damages. The defendant further contended that the plaintiffs were estopped in law and/or from terminating the SPAs since they were themselves in breach of the terms and conditions thereof by failure to make the progress payment. Further, the plaintiffs had allowed time to pass after the contractual completion date without fixing a fresh limit for first defendant to complete the works and hand over vacant possession before purportedly terminating the SPAs. Consequently, time was set at large and the plaintiffs had waived their rights to rely on time being the essence of the agreement and terminating by reason thereof.

Held, allowing the application with costs:

(1) The SPA had been duly terminated from the moment the plaintiffs filed a writ of summons terminating the SPAs. There was no specific clause in the SPA to suggest that the purchaser was not entitled to terminate the

SPA. Clause 21 was silent on the issue of termination and neither had the plaintiffs breached the SPA (see para 24).

(2) As was held in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817, actual damages or reasonable compensation must be proved in accordance with the principles set out in *Hadley v Baxendale* (1854) 9 Exch 341. Further, in *Selva Kumar* itself the court recognised that where the court finds it difficult to assess damages, as there is known measure of damages employable, the stipulated sum may be recoverable. In view of the above, the court was of the view that *Selva Kumar* was still good law (see para 28).

[Bahasa Malaysia summary

Plaintif-plaintif memohon untuk pembatalan perjanjian jual beli ('PJB') yang disempurnakan dengan defendan pertama, pemaju hartanah komersial. Defendan pertama gagal untuk membina dan memberikan milikan kosong hartanah plaintif-plaintif dalam masa 30 bulan dari tarikh PJB tersebut. Plaintif-plaintif berhujah bahawa kegagalan defendan pertama untuk memberikan milikan kosong dalam masa yang ditetapkan merupakan kemungkiran asas dan oleh itu, mereka berhak dari segi undang-undang untuk menamatkan PJB tersebut. Defendan pertama walau bagaimanapun berhujah bahawa plaintif-plaintif tidak berhak untuk menamatkan PJB tersebut kerana remedi untuk pemberian lewat adalah pampasan melalui ganti rugi yang ditetapkan. Defendan selanjutnya berhujah bahawa plaintif-plaintif diestop dari segi undang-undang dan/atau daripada menamatkan PJB tersebut memandangkan mereka dalam kemungkiran terma-terma dan syarat-syarat kerana gagal untuk membuat bayaran kemajuan. Selanjutnya, plaintif-plaintif telah membenarkan masa berlalu selepas tarikh siap kontrak tanpa menetapkan had baru untuk defendan pertama menyiapkan kerja-kerja dan memberikan milikan kosong sebelum menamatkan PJB tersebut. Akibatnya, masa ditetapkan pada bila-bila masa dan plaintif-plaintif telah melepaskan hak mereka untuk bergantung atas masa yang menjadi intipati perjanjian dan menamatkan atas alasan tersebut.

Diputuskan, membenarkan permohonan dengan kos:

(1) PJB telah ditamatkan dari masa plaintif-plaintif memfailkan writ saman menamatkan PJB tersebut. Tidak terdapat klausa yang spesifik dalam PJB untuk mencadangkan bahawa pembeli tidak berhak untuk menamatkan PJB tersebut. Klausa 21 tidak menyatakan apa-apa atas isu penamatan kerja dan plaintif-plaintif tidak memungkiri PJB tersebut (lihat perenggan 24).

(2) Seperti yang yang dputuskan dalam kes *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817, ganti rugi sebenar atau pampasan munasabah mesti dibuktikan mengikut prinsip-prinsip yang

ditetapkan dalam kes *Hadley v Baxendale* (1854) 9 Exch 341. Selanjutnya dalam kes *Selva Kumar* sendiri, mahkamah mengenali bahawa di mana mahkamah sendiri sukar untuk mentafsir ganti rugi, memandangkan terdapat sukatan ganti rugi yang boleh dikenalkan, jumlah yang ditetapkan boleh didapatkan balik. Memandangkan alasan di atas, mahkamah berpendapat bahawa *Selva Kumar* masih lagi undang-undang yang betul (lihat perenggan 28).]

Notes

For cases on breach in general, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2918–3260.

Cases referred to

Citibank Na v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)
Hadley v Baxendale (1854) 9 Exch 341; (1843–1860) 9 Exch 341 (refd)
Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2009] 3 MLJ 349, CA (refd)
M-Concept Sdn Bhd v Berjaya Times Square Sdn Bhd [2004] 4 MLJ 556, HC (refd)
Ng Ah Ba & 2 Ors v Ramanda Sdn Bhd [1996] 1 MLJ 62; [1996] 1 CLJ 738, CA (refd)
Oil & Natural Gas Corp Ltd v Saw Pipes Ltd [2003] LR 1 348, SC (refd)
Pusat Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd [2000] 1 MLJ 513; [2000] 1 CLJ 346, CA (refd)
Sea Housing Corp Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31, FC (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817, FC (refd)

Legislation referred to

Contracts Act 1950 ss 56(1), 75
Rules of the High Court 1980 O 14, O 81, O 81 r 1, O 81 r 1(b)

N/A

Nurchaya Arsad J:

APPLICATION

[1] This is plaintiffs' application under O 81 r (1)(b) seeking rescission of SPA executed with the first defendant the developer of commercial properties in a development project known as Summit Centre, Seri Kembangan.

HELD

[2] With that this application is allowed, with cost RM1000 to each plaintiff

and with damages to be assessed.

FACTS

[3] First of all it is important to note that the 12th, 13th, 18th plaintiffs and the second defendant are no longer parties in the proceedings. The plaintiffs in this case executed their respective SPAs with the first defendant. According to cl 4, time is of the essence of the SPAs. By cl 21, the defendant was to deliver vacant possession within 30 months from the date of SPAs. By cl 22, the first defendant was to deliver vacant possession a certificate being issued by its architect certifying that the construction of the properties had been duly completed. However, the first defendant failed to construct and deliver vacant possession of the plaintiffs' properties within 30 months from the date of the SPAs. The first defendant also has not issued any notices to the plaintiffs waiving or modifying the delivery dates of the said properties.

GROUNDS

[4] Order 81 r 1of the RHC stated that the plaintiff may on the grounds that the defendant has no defence to the action apply to the court for summary judgment.

[5] In *Ng Ah Ba @ng Looi Seng & 2 Ors v Ramanda Sdn Bhd* [1996] 1 MLJ 62; [1996] 1 CLJ 738 the court held that an application for summary judgment under O 81 of the RHC is a procedure similar to O 14 of the RHC, the defendant need only to show that there is a triable issue or that there ought for some other reasons to be a trial of the action.

[6] In *Citibank Na v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 the court held that where all issues are clear and the matter in substance can be decided once and for all without going to trial the matter ought to be decided under O 14 application.

[7] According to the plaintiffs, the delivery date for the said properties had expired through effluxion of time, on 27 August 2002, the plaintiffs filed a writ of summons terminating the SPAs. After the proceedings herein had commenced, on or about 8 August 2003 (after a delay of over five years), the first defendant purported to deliver vacant possession of the properties to the plaintiffs and requested the last 10% of the purchase price. However, up to this date the first defendant has still not delivered the vacant possession.

[8] The arguments brought by the defendant are as follows:

[9] Firstly the plaintiffs are not entitled to terminate the SPAs due to delay in delivery of vacant possession of the properties. This is because under the terms and condition of SPA cl 21 is subject to cl 32 whereby the plaintiffs must pay all the installments and monies payable under the SPAs as and when they become due, then only the first defendant shall hand over to the plaintiffs vacant possession of the properties within 30 months from the date of SPAs. If not, the first defendant shall pay liquidated damages in the sum of 10%pa on such part of the purchase price paid by the plaintiffs to the first defendant. Therefore the plaintiffs are not entitle to terminate the agreement if the defendant late delivery of vacant possession as the SPAs have specially provided that the remedy for late delivery shall be compensated by liquidated damages.

[10] In *Pusat Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdh Bhd* [2000] 1 MLJ 513; [2000] 1 CLJ 346 where the COA held that the first question that springs to mind when considering the issue of termination is whether the agreement allows the respondent to do so.

[11] However the plaintiffs stated that in *Pusat Damansara*'s case there is a specific clause which stated that the purchaser was not entitled to terminate the agreement. However in this case, such clause does not exist. Clause 21 silent on the issue of termination and neither have the plaintiff breached the SPA and reference is therefore made to Contracts Act 1950. By cl 4 of the SPAs, time was the essence and by cl 21 the first defendant was required to deliver vacant possession within 30 months from the date of SPA.

[12] Section 56(1) of the Contracts Act 1950, explain on the effect of failure to perform at fixed time, in contract in which time is essential. It stated that when the party to a contract promises to do a certain things at or before a specified time, or certain things at or before specified times, and fails to do any such at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the opition of the promise, if the intention of parties was that time should be of the essence of the contract.

[13] Thus, the failure of the defendant to delivered vacant possession wifhin stipulated time amounts to a fundamental breach of s 56(1) and the plaintiff are lawfully entitled to terminate the SPA.

[14] Secondly the defendant argued that the plaintiffs are stopped in law and/or from terminating the SPAs since:

(a) they are themselves in breach of the terms and conditions thereof by failure to make the progress payment;

(b) they had allowed time to pass after the contractual completion date without fixing a fresh limit for first defendant to complete the works and

hand over vacant possession before purportedly terminating the SPAs. Consequently, time was set at large and the plaintiffs had waived their rights to rely on time being the essence of the agreement and terminating by reason thereof.

[15] Regarding this issue the plaintiffs stated that exhs 'KLY2 to KLY14' are all dated 8 August 2003 after the plaintiff had terminated the SPA on 27 August 2002. The third, fourth, fifth plaintiff paid the progress payment for the fourth stage on 11 July 1996 in complaince with first defendant invoice of 26 June 1996 (exh 'KLY3') and there was no delay in the payment as alleged by the first defendant. Furthermore the plaintiffs dutifully paid all the progress payment as billed by the first defendant prior to them terminating the SPA's.

[16] The plaintiffs stated that they never delay in terminating the SPA. In exh 'S6' whereby Dato Yap Pian Hon, the member of Parliament for Serdang in letter dated 27 August 2001 to the first defendant talks about discussion held on the delay in completing the said project and states that the purchasers have complained on the delay and the first defendant had promised to give a commitment on the date of intended completion of the said project which the first defendant clearly failed to do. After the first defendant failed to complete the said project despite it commitment to do so by 2001, the plaintiffs filed in the writ of summons on 27 August 2002 and thus no issue of them having delayed filling the action herein.

[17] The plaintiffs also stated that the first defendant cannot use the doctrine of estoppels as the first defendant by breaching the SPAs has not come to court with clean hands. Thus a person who does not come to court with clean hands cannot pray the principle of equity as in this case the doctrine of estoppels. This is stated in the case of *M-Concept Sdn Bhd v Berjaya Times Square Sdn Bhd* [2004] 4 MLJ 556.

[18] Thirdly, the first defendant is not liable to the plaintiffs to pay liquidated ascertained damages ('LAD') because:

(a) the first defendant will only deliver vacant possession, of the properties within 30 months from the date of SPA subject to the plaintiffs' compliance with the condition precedent in cl 21 of the SPAs which the plaintiffs had failed to comply;

(b) the first defendant shall not be liable to the plaintiffs for any delay in delivery of vacant possession if due to events or circumstances beyond the first defendant's control, (force majeure).

[19] This issue has been answered by the plaintiffs as the plaintiffs through

their exhibit showed that they had dutifully paid all the installments as billed by the first defendant prior to them terminating the SPAs.

[20] However, the plaintiffs stated that the reasons that the first defendant given in failing to complete the said project was due to a dispute between the main contractor its employer, default of contracts/subcontractors, shortage of materials, difficulty in obtaining financing and delay by the authorities. However, there was no evidence tendered by the first defendant to substantiate this.

[21] Furthermore, the defence of force majeure is inapplicable here as the words force majeure is defined in *ADVAnce Law Lexicon* (3rd Ed), Vol 2 (2005) as 'a contract provision that stipulates that unforeseen events-wars, acts of god, certain strike that will excuse a party from its duty to perform the contract'.

[22] In the case of *Sea Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 (Federal Court), the defendant claimed that the project which they were developing faced an acute shortage of contractors, subcontractors skilled and semi-skilled labour and construction workers and there was a shortage of building material and these circumstances were beyond their control and this defence was rejected by the court.

[23] Fourthly, the first defendant stated that the plaintiffs are not entitled to commence and/or maintain this action against the first defendant as they have not obtained the consent of the assignee financiers.

[24] The plaintiff stated that the 19th, 20th, 21st 22nd plaintiffs are cash purchasers and the first, second, third, fourth, fifth, sixth, eighth, 14th, 15th, 16th, 17th, 23th, and 24th plaintiffs have obtained the consent of their financier to commence the action herein. The consents were exhibited under exh 'S3'.

[25] The court was of the opinion that, the SPA has been duly terminated at the moment the plaintiffs filed a writ of summons terminating the SPAs. There is no specific clause in this case to suggest that the purchaser is not entitled to terminate the SPA. Clause 21 silent on the issue of termination and neither have the plaintiff breached the SPA and reference is therefore made to Contracts Act 1950.

[26] However with regards to the issue of damages, s 75 of the Contracts Act 1950 stated that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, *whether or not actual damage or loss is proved to have been*

caused thereby, to receive from the party who has broken the contract reasonable compensation *not exceeding the amount so named or*, as the case may be, the penalty stipulated for.

[27] However in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817, the court held that:

> Whether or not actual damage or loss is proved to have been caused thereby (the word in question) must be given a restricted construction. Hence despite the words in question, a plaintiff who is claiming for actual damages or the reasonable compensation in accordance with the settled principle in *Hedley v Baxendale*.

[28] Furthermore, in *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 3 MLJ 349, Arifin Zakaria CJM stated that:

> The appellant/vendor cannot recover or retain without proof by evidence of the loss or damage suffered as a result of the breach of the agreements. This is because s 75 of the Act provides that in every case, the court must determine what is reasonable compensation, 'whether or not actual damage or loss is proved to have been caused thereby'.

[29] And as was held in *Selva Kumar* actual damages or reasonable compensation must be proved in accordance with the principles set out in *Hadley v Baxendale* (1854) 9 Exch 341; (1843-1860) 9 Exch 341. The appellant urged this court to depart from *Selva Kumar* and the long series of decisions on s 75 relying on a recent two bench decision of the Supreme Court of India in *Oil & Natural Gas Corp Ltd v Saw Pipes Ltd* [2003] LR 1 348. Upon close examination, I find that *Oil & Natural Gas* falls in the category of cases where the loss suffered is incapable of assessment. Hence, the amount stipulated may be regarded as a genuine pre-estimate of damages and therefore it is recoverable. Further in *Selva Kumar* itself the court recognised that where the court finds it difficult to assess damages as there is known measure of damages employable, the stipulated sum may be recoverable. It should also be noted that nowhere in *Oil & Natural Gas*, the Indian Supreme Court stated that the provisions of the Indian Contracts Act can be contracted out. In view of the above, I am of the view that *Selva Kumar* is still good law. For the above reasons, I would therefore answer the first question in the affirmative.

[30] With that this application is allowed, with cost RM1,000 to each plaintiff and with damages to be assessed.

Application allowed with costs.

Reported by Ashgar Ali Ali Mohamed